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In the Supreme Court of the United States

OCTOBER TERM 1961

No. 804

WARREN R. NEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1962 (Pet. App. 16a). The petition for a writ of certiorari was filed on March 20, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence in the present case met the standard of proof applicable to prosecutions under 18 U.S.C. 1001.

2. Whether the trial court's instruction as to the nature of wilfulness under 18 U.S.C. 1001 was erroneous.

STATUTE INVOLVED

Title 18, United States Code:

Sec. 1001. *Statements or entries generally.*

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted for falsely stating to a revenue agent that an agreement under which petitioner had paid land rent in 1955 did not contain an option to purchase the land, and for delivering to the revenue agent a false copy of the agreement from

which the option had been deleted (III R. 95-97),[1] in violation of 18 U.S.C. 1001, *supra*. On March 31, 1961, petitioner was convicted by jury on both counts (III R. 114). Thereafter, on June 26, 1961, petitioner was sentenced to a term of imprisonment of ten months, and to a fine of $2,000, on each count, the sentences to run concurrently (IV R. p. 39-40). The Ninth Circuit affirmed the judgment and sentence of the district court.

During 1954, petitioner became interested in the acquisition of certain lands in Maricopa County, Arizona (II R. 9, 11, 13-14, 31, 155). Although the property was first presented to petitioner for purchase, petitioner insisted on acquiring the property under a three-year lease with an option to purchase the property inserted as a clause in the agreement (II R. 10, 14, 25, 31-32, 158, 161, 162). Before entering into this agreement, petitioner had been advised by his accountants that a lease agreement with an option-to-purchase clause might result in controversy with the Internal Revenue Service and in the disallowance of the portion of the payments claimed as rent, if an Internal Revenue Agent examined his tax return (II R. 31-32).

In July 1954, as a result of the petitioner's negotiations, petitioner and the owners of the land entered

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[1] The record before this Court is comprised of five separately paginated volumes. Vol. I contains the formal record of proceedings in the district court, and Vol. V contains the proceeding in the court of appeals. The other three volumes contain transcripts of the court proceedings. References will be made by volume and by page, *e.g.*, "I R. 1-2".

into a lease-and-option-to-purchase agreement whereby petitioner was to pay $55,000 annual rent for the land for three years, and was to have the option of purchasing the land outright upon the end of the three-year term for an additional payment of $150,000; the amount of the payment to be made in exercise of the option was raised to $165,000 by a modification of the lease-and-option-to-purchase agreement entered into by the parties on December 14, 1954 (II R. 46-47, 183). Petitioner stipulated that, throughout the period covered by the agreement and since that time, he has had a valid option to purchase the land covered by the document entitled "Lease and Option to Purchase" (II R. 72-73).

During March 1955, petitioner sought a loan from his banker, and, in the course of negotiating for the loan, he informed the banker that he had entered into a lease agreement for the Maricopa land, and that the lease agreement included a purchase option (II R. 24-25).

In preparing petitioner's income tax return for 1955, petitioner's accountant claimed the full amount of the payment made pursuant to the agreement as a rental deduction because he understood that there was no option to purchase in the lease agreement (II R. 33).

On July 17, 1957, Revenue Agent Nathan Albert met with petitioner in the course of the conduct of a routine examination of petitioner's 1955 federal income tax return (II R. 78-79). The revenue agent told petitioner that the main issue was the rental expense claimed on petitioner's 1955 return in the

amount of approximately $57,000 (II R. 83-84). Revenue Agent Albert asked petitioner for the name of the person to whom he had paid this rent. Albert then asked petitioner whether the lease contained an option to purchase the land. Petitioner told Albert that the lease did not contain an option to purchase. The revenue agent said, "Good," and advised petitioner that, had there been an option-to-purchase clause, the rental deduction would not be allowed. He told petitioner that in order to allow the rental deduction he would need to examine and attach a copy of the agreement to his report. Petitioner agreed to obtain a copy of the agreement. (II R. 84.) Petitioner admitted that he thereupon took the original lease and option-to-purchase agreement to Attorney Richard G. Johnson who had drafted the document, and directed him to eliminate the option from the agreement (II R. 47-48, 171-172). Attorney Johnson separated the lease from the option clause by drawing red lines around the option provisions (II R. 45-48, 55). The lease and option agreement was then retyped, in accordance with Attorney Johnson's red markings, into two separate agreements (II R. 171). Revenue Agent Albert, petitioner and petitioner's accountant then met at the accountant's office.

Petitioner personally delivered the modified agreement, from which the option clause had been excised, to Revenue Agent Albert and waited while Albert examined the document. When Albert stated "I see there is no option on this lease," petitioner left the document with him. (II R. 85-86, 173.) The revenue

agent thereupon closed the audit and allowed petitioner the rental deduction claimed (R. 87).

ARGUMENT

The decision of the court of appeals is correct. No conflict of decision or important question of law is presented. Further review by this Court is unwarranted.

1. Petitioner contends that the standard of proof applicable in perjury cases, as enunciated in *Weiler* v. *United States*, 323 U. S. 606, should be made applicable to a prosecution, not involving perjury, arising under 18 U.S.C. 1001, *supra*, p. 2. Petitioner avers that the falsity of his statement must be established either by the circumstantially corroborated testimony of one witness or by the independent testimony of two witnesses.

The courts of appeals of the several circuits have consistently rejected the application of the perjury standard of proof to prosecutions arising under 18 U.S.C. 1001. See *Marzani* v. *United States*, 168 F. 2d 133, 141-142 (C.A.D.C.), affirmed by an equally divided court, 335 U. S. 895; *United States* v. *McCue*, decided March 20, 1962 (C.A. 2d); *United States* v. *Killian*, 246 F. 2d 77 (C. A. 7th); *Fisher* v. *United States*, 254 F. 2d 302 (C. A. 9th), certiorari denied, 358 U. S. 895; *De Casaus* v. *United States*, 250 F. 2d 150 (C. A. 9th), certiorari denied, 356 U. S. 949; *Todorow* v. *United States*, 173 F. 2d 439 (C. A. 9th), certiorari denied, 337 U. S. 925; *Sells* v. *United States*, 262 F. 2d 815 (C. A. 10th), certiorari denied,

360 U. S. 913; *Travis* v. *United States*, 269 F. 2d 928, 936 (C. A. 10th), reversed on other grounds, 364 U. S. 631.

Even if the perjury rule enunciated by this Court in *Weiler* v. *United States*, *supra*, were applicable to prosecutions under 18 U.S.C. 1001, the evidence presented in the record would contain ample corroboration of the testimony of Revenue Agent Albert. Albert testified that, in examining petitioner's 1955 return and the rental deduction claimed, he had asked petitioner if the lease agreement contained an option to purchase the land, and that petitioner had replied that it did not (II R. 84). Petitioner admitted procuring a lease and option to purchase the Maricopa land in 1954, and had so informed his banker in 1955 (II R. 24-25, 46, 72-73, 183). Significantly, petitioner's accountant had been unaware of the true nature of the agreement when he prepared petitioner's 1955 income tax return in 1956 (II R. 33, 137-138). The lease and option had constituted one agreement at the time of petitioner's first conference with the revenue agent in July 1957 (II R. 45-48, 171-172). Immediately after this conference petitioner admitted that he had gone to Attorney Johnson and had insisted that the original document be separated into two distinct agreements (II R. 45-48, 171-173). Petitioner's precipitate insistence on the separation of the lease and option agreement, and his subsequent delivery of the purported copy to Revenue Agent Albert corroborate Albert's testimony by showing petitioner's urgent desire to conform the appear-

ance of the agreement to his misrepresentation as to its nature.

Petitioner's knowledge of the false nature of the document he presented to the revenue agent is equally manifest. Petitioner admitted that he had wanted to exercise the option provision of the lease and option agreement at the time of his conference with the revenue agent, but stated that he had wished to conceal the option from the agent in order to avoid controversy (II R. 173, 178). Petitioner also admitted that, on March 30, 1959, when he testified in a law suit in the Superior Court of Maricopa County, Arizona, about the document he had presented to the revenue agent, he had sworn that he had not considered the document a binding agreement (II R. 189-191). On cross examination, petitioner admitted that he had not intended to advise the government of the existence or exercise of his option at any time (II R. 202-203). In short, petitioner had known the purport of the revenue agent's request, and, in a studied attempt to sustain the improper rental deduction, had prepared and presented to the agent a false copy of the agreement. Thus, the evidence amply supports the verdict of the jury, whether the standard of proof applicable to prosecutions for perjury or the lesser standard of proof applicable for prosecutions of violations of 18 U.S.C. 1001 be applied.

2. Petitioner also contends (Pet. 2, 4-5, 9-11) that the trial court erred in instructing the jury. The court had stated: "[I]t is not necessary that Government prove that the defendant in fact had an evil intent" (III R. 104). In *United States* v. *Murdock*,

290 U. S. 389, 394-395, upon which petitioner relies (Pet. 9-10), this Court held that "willfully" is a word of many meanings. See *Screws* v. *United States*, 325 U. S. 91, 101; *Spies* v. *United States*, 317 U. S. 492, 497. See, also, *Fields* v. *United States*, 164 F. 2d 97 (C.A.D.C.), certiorari denied, 332 U. S. 851-852. At one extreme, "willfully" may mean performing an act with an evil purpose; at the other extreme, the word may characterize knowing or voluntary conduct as distinguished from accidental conduct. The meaning of the word must be determined from its statutory context. *Screws* v. *United States*, *supra*. On a charge under 18 U. S. C. 1001, the trial court's instruction was proper. See *McClanahan* v. *United States*, 230 F. 2d 919, 924 (C.A. 5th), certiorari denied, 352 U. S. 824; *Corcoran* v. *United States*, 229 F. 2d 295, 299 (C. A. 5th); *McBride* v. *United States*, 225 F. 2d 249 (C. A. 5th), certiorari denied, 350 U. S. 934; *Walker* v. *United States*, 192 F. 2d 47, 49 (C. A. 10th); cf. *Mitchell* v. *United States*, 143 F. 2d 953, 956 (C. A. 10th). See also *Browder* v. *United States*, 312 U. S. 335, 340-342 (false statement on a passport application).

Petitioner complains (Pet. 11) that the court's instruction made the element of wilfulness coincide with the element of knowledge, so that the independent status of wilfulness was eliminated. But a fair reading of the charge makes it clear that no reasonable jury would have so understood the judge's instructions, for the jury was repeatedly told (III R. 104), that the alleged false statements must have been *both* knowing *and* wilful, *i.e.*, voluntarily and

purposely made, and not made by reason of mistake, inadvertence or other innocent cause. What petitioner sought to add by his own requested instruction (III R. 105-106), and by his objection to the charge as given, was a requirement that the jury must find that he had a specific intent to do an act in violation of 18 U.S.C. 1001 before they could find him guilty. The authorities cited above reject such a requirement, and none of the cases cited by petitioner supports it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
K. WILLIAM O'CONNOR,
Attorneys.

APRIL 1962.

The trial court actually did give the instruction requested by petitioner at two points during the charge (III R. 97, 99). "But the fact that the defendant by virtue of getting a charge too favorable to himself may have got a case submitted to the jury in an erroneous fashion does not show error of which he can complain.", *United States* v. *Searcy*, 180 F. 2d 837, 840 (C.A. 3d), certiorari denied, 339 U. S. 979.

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